
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

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)
) **DEFENSE NOTICE OF
MOTION TO DISMISS**
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) **(MILITARY
COMMISSIONS
INPROPERLY
CONSTITUTED IN
VIOLATION OF
SEPARATION OF
POWERS)**
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)

19 August 2004

The Defense in the case of the *Salim Ahmed Hamdan* provides the following notice of motion:

1. This Notice is filed in accordance with the Presiding Officer's Order made via Email on 31 July 2004.
2. Relief Requested: The Defense seeks dismissal of charges because this Military Commission is not properly constituted.
3. Synopsis of Legal Theory: The President's Military Order providing for the establishment of military commissions is ultra vires and void, because it is an unconstitutional exercise of legislative and judicial power by the Executive Branch. The Constitution vests "All legislative Powers" in Congress, and requires, at a bare minimum, that unlawful conduct be defined in advance, either by positive legislation, or by reference to a recognized body of international law.
Article I of the Constitution grants Congress, not the Executive, the power "To define and punish . . . Offences against the Law of Nations" and "To constitute Tribunals inferior to the Supreme Court." Accordingly, absent circumstances so exigent as to demonstrably rule out resort to Congress, that lawmaking body and not the Chief Executive must be the authorizing agent of the military commissions and the body that defines the offenses for which an accused will be answerable before such commissions. Neither the Use-of-Force Resolution nor any other act of Congress grants to the Executive Branch under the circumstances presented here the authority to establish military commissions, or to define the offenses that will be subject to their exclusive jurisdiction.
In addition to enabling the unlawful exercise of legislative powers, the Military Order also purports to suspend the Writ of Habeas Corpus and to circumscribe the jurisdiction of the federal courts in violation of Art. I § 9 and Art. III § 2 of the Constitution, by denying to persons held subject to the Military Order any access, remedy, or proceeding before "any court of the United States." To proceed in this manner is to dismantle the jurisdiction of the Federal Courts, redesigning the very architecture of American justice, is to succumb to an executive unilateralism decried by both our Founders and twentieth-

century courts, and all who came between. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This Commission is under a clear and nondiscretionary duty to obey the Constitution and its foundational command of the separation of powers and as such must dismiss charges until the Commission is properly constituted under the Constitution.

4. Witnesses and Evidence: In the event that abeyance of hearing this motion requested below is not granted, the Defense intends to call expert witnesses concerning the Constitutionality of Commission proceedings in support of this motion.

5. Oral Argument: Because the full facts will not be known until such time as a conclusion of evidentiary hearing, the Defense requests oral argument for this motion.

6. Request for an Extension of Time: Defense moves to incorporate the decisions of the Federal Court into this tribunal process and to hold hearing of this motion in abeyance pending its resolution of the Constitutionality of the President's Military Order. In order to resolve whether the Military Commission is properly constituted to hear the United States case against Mr. Hamdan; the Military Commission must determine constitutionality of President's Order. Detailed Defense Counsel has already challenged in federal court on Mr. Hamdan's behalf as "next friend," the right of the government to hold Mr. Hamdan in-pretrial confinement pursuant for a proceeding that is facially unconstitutional. In order for the Federal Court to resolve the merits of Detailed Defense Counsel's petition, the Federal Court must determine whether the constitutionality of President's Military order. Detailed Defense Counsel anticipates resolution of this issue prior to its proposed date for commencement of the Commission to hear evidence on the merits of the case. Accordingly, the Defense moves to incorporate the decisions of the federal courts into this tribunal process and to hold hearing of this motion in abeyance pending the resolution of the constitutionality of these proceedings in Federal Court.

The proper course for this Commission to proceed is to allow for the Federal Court to decide these matters and for the Commission to follow the Federal Court's guidance. As stated by Attorney General Biddle in the Nazi Saboteur case; in his response to the defense's claim that "the order of the President creating this court is invalid and unconstitutional," Biddle said in part that:

In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants.

In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.

Thirdly, this is not a trial of offenses of law of the civil courts but is a trial of the offense of the law of war, which is not cognizable to the civil courts. It is the trial, as alleged in the charges, of certain enemies who crossed our borders, crossed our boundaries, which had then been described by the military and naval authorities, and who crossed in disguise in enemy vessels and landed here. They

are exactly and precisely in the same position as armed forces invading this country. I cannot think it conceivable that any commission would listen to an argument that armed forces entering this country should not be met by the resistance of the Army itself under the Commander-in-Chief or that they have any civil rights that you can listen to in this proceeding.

Transcript available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm ("Saboteur Tr.") (emphasis added). See also Rehnquist, *All The Laws But One* 137 (1998); Saboteur Tr., at 2765 (adjourning commission for a number of days so that defendants could proceed in Supreme Court); *id.*, at 2935 (remarks of the lead prosecutor, the Judge Advocate General defending commission's jurisdiction: "the defense counsel have attempted to show that Long Island and Florida were not in the theater of operations. I will admit that that contention was made before the decision of the Supreme Court yesterday on the habeas corpus matter. It seems to me that that probably will straighten out the question as to whether this is a theater of operation."); *id.*, at 2963 (remarks of Judge Advocate General, "I do not see how counsel can plead surprise when counsel was arguing that very thing to the Supreme Court)

In the present case, as with the Nazi saboteurs, the question of the Constitutionality is now before a civil court and as conceded by the government in its statements and practice with respect to the Nazi saboteurs, the Federal District Court's finding of law will be determinative on this Commission and judicial economy dictates that this motion be held in abeyance pending the civil court's resolution.